

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re

Assessment and Collection of Charges for
 FCC Proprietary Remote Software Packages,
 On-Line Communications Service Charges,
 and Bidder's Information Packages in
 Connection With Auctionable Services

WT Docket No. 95-69

Notice of Proposed Rulemaking

Adopted: May 16, 1995

Released: May 16, 1995

Comment Date: May 31, 1995

Reply Comment Date: June 5, 1995

By the Commission:

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I. INTRODUCTION

1. By this Notice of Proposed Rulemaking, the Commission begins a proceeding to establish a schedule of fees applicable to the remote electronic filing, remote access to applications filed with the Commission, remote bidding and the bidder's information packages available to participants in future Commission auctions.

II. BACKGROUND

2. In previous FCC auctions, bidders have paid auction contractors of the Commission fees consisting of the contractors' costs and a reasonable profit for remote bidding software and an on-line access charge. Because the Commission will provide such services directly to bidders, we propose that the bidders pay such fees to the Commission. The Independent Offices Appropriation Act of 1952, as amended ("IOAA"), codified at 31 U.S.C. § 9701, permits fees and charges for Government services and things of value. "It is the sense of Congress that each service or thing of value provided by an agency ... to a person ... is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). The IOAA, therefore, authorizes agencies to prescribe regulations that establish charges for products and services provided by the agency. The charges must be fair and must be based on the costs to the Government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts. See 31 U.S.C. § 9701(b).

3. Since 1959, the Office of Management and Budget ("OMB") has issued policy guidance on fees through Circular A-25 ("OMB Circular"). See FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974) (citing the OMB Circular). On July 15, 1993, OMB published a revised version of the OMB Circular in the Federal Register (58 Fed. Reg. 38142), which provides updated policy guidance on user fees. Pursuant to the revised OMB Circular, the imposition of fees for Government-provided products and services that confer benefits on identifiable recipients over and above those benefits received by the general public are encouraged. Pursuant to the OMB Circular, each agency, in establishing fees or other charges,

is to select between "full cost"¹ or "market price"² in its calculation of the charges.

4. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103 - 66, 107 Stat. 312, added a new section 309(j) to the Communications Act of 1934, 47 U.S.C. § 309(j). This amendment to the Communications Act authorized the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for initial licenses for use of the radio spectrum. Pursuant to this authority, the Commission has conducted three simultaneous multiple round auctions for Personal Communications Service ("PCS") licenses.³

5. In each of the three PCS auctions, bids were placed electronically using a computer bidding system designed and developed by the FCC in conjunction with its auction contractors. In the Nationwide Narrowband PCS auction, bidders were required to be physically present at the auction site to place their bids using the on-site electronic bidding system. The FCC, in conjunction with its auction contractors, developed a new electronic bidding system for the Regional Narrowband PCS auction which offered bidders the choice of placing their bids: (1) using the on-site electronic bidding system; (2) from remote locations using the bidder on-line electronic bidding software; or (3) from remote locations using FCC operator-assisted telephonic bidding. With certain enhancements and upgrades, this system was used again in the Broadband MTA auction.

¹The OMB Circular provides that "full cost" includes all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service. 58 Fed. Reg. at 38145. These costs include, but are not limited to, an appropriate share of: (a) direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement, including all funded or unfunded accrued retirement costs not covered by employee contributions; (b) physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment; if imputed rental costs are applied, they should include depreciation of structures and equipment, based on official Internal Revenue Service depreciation guidelines unless better estimates are available and an annual rate of return (equal to the average long-term Treasury bond rate) on land, structures, equipment and other capital resources used; (c) the management and supervisory costs; and (d) the costs of enforcement, collection, research, establishment of standards, and regulation, including any environmental impact statements. *Id.*

²The OMB Circular provides that "market price" means the price for a good, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the good, resource, or service. 58 Fed. Reg. at 38145. When a substantial competitive demand exists for a good, resource, or service, its market price will be determined using commercial practices, *e.g.*, either by competitive bidding or by reference to prevailing prices in competitive markets for goods, resources, or services that are same or similar to those provided by the Government with adjustments as appropriate that reflect demand, level of service, and quality of the good or service. In the absence of substantial competitive demand, market price will be determined by taking into account the prevailing prices for goods, resources, or services that are the same or substantially similar to those provided by the Government, and then adjusting the supply made available and/or price of the good, resource, or service so that there will be neither a shortage nor a surplus. *Id.*

³These three auctions included: (1) the Nationwide Narrowband PCS auction, held from July 25 through July 29, 1994; (2) the Regional Narrowband PCS auction, held October 26 through November 8, 1994; and (3) the Broadband A and B Block PCS auction, held December 5, 1994, through March 13, 1995 (also known as the Broadband Major Trading Area ("MTA") auction).

6. The Commission and its auction contractors incurred significant costs in developing the on-site electronic bidding systems used in these auctions and the remote electronic bidding system used in the Regional Narrowband PCS auction and the Broadband MTA auction. The Commission recovered its development costs for the electronic bidding system for the first three auctions from the proceeds of those auctions. See 47 U.S.C. § 309(j)(8). In addition, the FCC's auction contractor, Business Information Network (BIN), was permitted to charge bidders electing to use the on-line remote bidding system a \$200.00 fee for the proprietary remote bidding software package and a \$23.00 per-hour on-line access charge. This charge was calculated to compensate BIN for its costs plus a reasonable profit in developing the remote access bidding software. Bidders in the Regional Narrowband PCS auction and the Broadband MTA auction were also offered the option of bidding on-site or telephonically at no charge.

7. The FCC has determined, based on its recent auction experience, that remote electronic bidding provides bidders with an important and valuable service as it enables them to place and withdraw bids, access auction round results and other FCC announcements during the auction from their offices using their personal computer. Thus, bidders are not required to be physically present at the auction site for the duration of the auction. In this regard, we note that a majority of bidders in the Regional Narrowband and Broadband MTA auctions used the remote electronic bidding system to participate in the auction. Therefore, the FCC has determined that remote electronic bidding will be an important feature in future auctions. Accordingly, the Commission has developed its own remote on-line bidding system that will be offered as a convenience to bidders in future FCC auctions. The FCC's remote electronic bidding system will enable bidders to participate in FCC auctions, review applications and access auction round results information from remote locations using a Wide Area Network to connect with the bidding system via a 900 telephone service ("900 service").⁴ It is contemplated that bidders will continue to have the option of placing their bids telephonically from remote locations via an 800 telephone service at no charge. Round results information is also available to remote access bidders over the Internet and the FCC's Bulletin Board at no charge.

III. DISCUSSION

8. The Federal Government has incurred significant costs and expenses in developing its remote electronic auction systems. The costs include infrastructure design and implementation, software development, software testing, and administrative and personnel costs associated with this process. We propose to recover these costs to the Government pursuant to the IOAA by charging bidders who elect to bid electronically from remote locations a fee for the remote bidding software and for remote access to the bidding system. We believe that imposing a fee on those bidders who actually use the remote electronic bidding system is the fairest and most equitable means for the Government to recover its costs in developing, maintaining, enhancing, and upgrading the remote auction systems. In previous FCC auctions, we have permitted our auction contractors to recover their costs plus a reasonable profit by charging bidders a fee for the remote bidding software and an on-line access charge. Since the FCC will now provide these services directly to bidders, we propose to recover the Government's costs by charging bidders a fee for the remote electronic bidding software and an on-line access charge via the 900 service. Additionally, as we proceed with future auctions, we may adopt new rules or modify our existing rules and the software may need to be adjusted to implement these new rules. As a result, the Government may incur additional costs as the auctions proceed. To recover these costs as well as to recover the costs of printing bidder's information packages, the Commission proposes to institute a new schedule of fees. Any funds received from the sale of auction materials, software,

⁴The General Services Administration is currently in the process of making arrangements to add 900 service to the Federal Telecommunications System 2000 contract, i.e., to the Government-wide telephone system.

or services must go directly to the U.S. Treasury. Unless an agency is specifically authorized by statute to retain outside monies it receives, such monies must be deposited in the Treasury as "miscellaneous receipts." See 31 U.S.C. § 3302(b); 69 Comp. Gen. 260, 262 (1990).

9. For the fees proposed below, the Commission has followed the guidance provided by the OMB Circular and relevant court cases⁵ in calculating the costs of the products and services to be provided by the Commission. As previously mentioned, each agency, in establishing charges, is to select between "full cost" or "market price" in its calculation of the charges. Upon initial review of both methodologies (see footnotes 1 and 2, *supra*), we propose to utilize "market price" in establishing the proposed fees because we believe it is simpler, practical, efficient, and more easily ascertainable than utilizing the "full cost" approach. More particularly, we propose to utilize the prevailing price methodology for remote access to the FCC auction systems, remote access software packages and the bidder's information package. Pursuant to the IOAA, the OMB Circular, and the findings outlined below, the Commission, therefore, is proposing fees for the following products and services that confer a special benefit on identifiable recipients and interested persons: \$4.00 per minute for electronic access through a 900 telephone number service ("900 service") to access the FCC Remote Access System (to submit bids, file applications electronically, obtain round results data, review filed applications, etc.); \$200.00 per bidding software package; one bidder's information package will be provided to each entity free of charge and there will be a \$16.00 charge for each additional bidder's information package (including postage) requested by the same person or entity. Appendix B sets forth the proposed rules for establishing these fees.

10. **900 Service.** The Commission will institute a 900 Telephone Service from a long distance telephone carrier which will provide bidders with the option of participating in the auction electronically from remote locations. This service will enable bidders to submit FCC applications on-line, review submitted applications, place and withdraw auction bids, and access round results from remote locations. The primary difference between 900 telephone service and 800 telephone service is the party responsible for paying for the service (900 Telephone service is paid for by the dialing party, while 800 telephone service is paid for by the party that orders the service, in this case the FCC). Both 800 and 900 number services provide a detailed accounting of the initiating phone numbers, which is critical for electronic forms filing and auction bidding. This reporting function is necessary in order for the Commission to perform its audit functions. Direct dial telephone service (i.e., 202 exchange) does not provide the reporting that is essential to the security of the auction programs. The proposed charges for the 900 service will recover the costs incurred by the Government in installing the service and will also defray the infrastructure design and implementation, hardware and software development costs. FCC license and auction applicants may still submit their applications in hard copy and bidders will continue to have the option of bidding telephonically from remote locations and accessing round results via the Internet or the FCC Bulletin Board Service free of charge. As always, applications will be available for inspection in the applicable reference room and the Public Notices that identify accepted, incomplete and rejected applications will be available over the Internet free of charge. The proposed fee for 900 service is based on our survey of the charges for similar on-line services. The services surveyed were primarily on-line reference and research services operating in the open market with sufficient competition to establish a market-based price. Our sampling revealed that prices currently range from \$4.05 per minute charged by Westlaw, to \$4.42 per minute charged by Lexis-Nexis (plus monthly account maintenance fees charged by both vendors). While the average price for this type of service is \$4.23 per minute, we believe

⁵See, e.g., *National Cable Television Ass'n. Inc. v. F.C.C.*, 554 F.2d 1094 (1976) ("Fee" is payment for special privilege or service rendered, and not revenue measure; and if "fee" unreasonably exceeds value of specific services for which it is charged, it will be held invalid); and *Engine Manufacturers Ass'n v. E.P.A.*, 20 F.3d 1177 (1994).

that charging a fee of \$4.00 per minute would be fair and reasonable. Because the on-line time under the Commission's remote on-line bidding system will be considerably less than that required via the previously offered commercial service, this factor further supports the reasonableness of a fee of \$4.00 per minute. We seek comment on these proposed charges.

11. Remote Access Bidding Software. The remote access bidding software will enable bidders to submit and withdraw bids from remote locations (e.g., from their offices using their own personal computers). In addition, the software is interactive and will provide bidders with automatic feedback by displaying applicable error messages and confirmation of submitted bids and withdrawals. Also, the bidder software will enable bidders to download auction round results files and access other auction information. The proposed fee for the remote access bidding software packages was based on the open market prices for similar software packages. Our research indicated that the most comparable software package currently available is \$200.00 per package and offered by only one supplier, BIN, the FCC's auction contractor in the Regional Narrowband and Broadband MTA auctions. Given the highly specialized nature of the remote access software, we were unable to identify other comparable software packages for which we could obtain additional market price information. Therefore, we propose to charge a similar fee of \$200.00 for each software package.⁶ We seek comment on whether this proposed fee is fair and reasonable and seek additional market price information for other comparable software packages.

12. Bidder's Information Packages. Prior to each auction, the Commission publishes a bidder's information package containing a description of the licenses to be auctioned, the procedures, terms, and conditions, relevant Public Notices, Commission Orders, and other essential documents and information relating to that auction. Each person or entity will be provided one bidder's information package for each auction free of charge. We propose, however, to charge a fee of \$16.00 for each additional bidder's information package requested by that same person or entity. The proposed fee for each additional bidder's information package was developed by comparing the average cost of producing bidder's information packages in the open market among commercial printing firms. The previous prices ranged from \$13.50, provided by Balmar Printing and Graphics, to \$18.50, provided by PIP Printing (both figures include postage). Based on the average of this range, we believe that charging a fee of \$16.00 per package would be fair and reasonable. We seek comment on this proposed fee.

13. We propose to use the following payment procedures to collect the above-described fees. The fee for the 900 service will appear as a charge on the user's monthly telephone bill; the fees for the software packages and the bidder's information packages will be collected by the Commission's auction contractor.⁷ Interested parties will be permitted to pay by credit card for the software and bidder's information packages. We believe that credit card payment is the most convenient and reliable method of payment both for bidders and for the Commission. Cashier's checks also will be accepted, although we will strongly encourage bidders to pay by credit card.

14. We emphasize that the auction process is an evolving program and, therefore, the proposed fees are subject to change. We will review the proposed fees annually by conducting additional market price surveys and will adjust the fees as appropriate as the Commission gains experience. See the OMB Circular, 58 Fed. Reg. 38142.

IV. PROCEDURAL MATTERS

⁶See the OMB Circular at 58 Fed. Reg. 38145.

⁷Under some circumstances, the Commission might, in its discretion, collect the proposed auction fees directly.

A. Comment Period and Procedures

15. Pursuant to the procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before May 31, 1995, and reply comments on or before June 5, 1995. All relevant comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting materials. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Interested parties who do not wish to participate formally in this proceeding may file informal comments at the same address. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

B. Ex Parte Rules

16. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See Sections 1.1202, 1.1203, and 1026 of the Commission's rules, 47 C.F.R. §§ 1.1202, 1.1203, and 1026(a).

C. Initial Regulatory Flexibility Analysis

17. As required by Section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1165, 5 U.S.C. § 601, et seq. (1981)), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the Notice, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

D. Authority and Further Information

18. Authority for this proceeding is contained in Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 303(r), as well as the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701.

19. Further information about this proceeding may be obtained by contacting Bert Weintraub, at (202) 418-1316.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding the Commission's proposal to establish and collect fees for FCC proprietary remote software packages, on-line communications service charges, and bidder's information packages in connection with auctionable services.

Objectives

The Commission seeks to collect the necessary amounts through its proposed fees, with the funds going to the U.S. Treasury.

Legal Basis

The proposed action is authorized under Sections (4)(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 303(r), as well as the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701.

Reporting, Recordkeeping and other Compliance Requirements

None.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposed fees may affect any auction bidder or interested party. These fees otherwise would be paid to an auction contractor to cover its own costs for providing similar services. Because the Commission will provide services directly to bidders, the Commission's proposal would recover the Government's costs from any bidders utilizing Commission-provided services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any fee revisions or additions or rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comments on alternative methods of collecting the proposed fees.

APPENDIX B

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 1 -- Practice and Procedure

1. The authority citation continues to read as follows:

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Sections 1.1181 and 1.1182 are added to Subpart G to read as follows:

§ 1.1181 Authority to prescribe and collect fees for competitive bidding procedures.

Authority to prescribe, impose, and collect fees for expenses incurred by the Government is contained in the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701, which authorizes agencies to prescribe regulations that establish charges for Government services and things of value for products and services provided by the Commission.

§ 1.1182 Schedule of fees for products and services provided by the Commission in connection with competitive bidding procedures.

Product or Service	Fee Amount	Payment Procedure
900 Telephone Service	\$4.00 per minute	Payment of user's telephone bill
Remote Access Bidding Software	\$200.00 per package	Payment to auctions contractor
Bidder's Information Package	First package free; \$16.00 per additional package, including postage, to same person or entity	Payment to auctions contractor